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No. 87-452

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1987

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
as Receiver for
BEVERLY HILLS SAVINGS AND LOAN ASSOCIATION,
*Petitioner,*

VS.

MURDOCK-SC ASSOCIATES, a Partnership,
*Respondent.*

## BRIEF OF MURDOCK-SC ASSOCIATES IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether 12 U.S.C. §§ 1464(d)(6)(C) and 1729(d) grant the Federal Home Loan Bank Board exclusive jurisdiction to adjudicate all claims involving the assets of an insolvent, federally insured savings and loan association.

2. Whether the Federal Home Loan Bank Board's assumption of exclusive jurisdiction over state law claims involving the assets of an insolvent, federally insured savings and loan association violates Article III, Section I of the U.S. Constitution.

3. Whether the Federal Home Loan Bank Board's administrative claims procedure is applicable in connection with a receivership in which the Federal Savings and Loan Insurance Corporation has entered into a purchase and assumption transaction in lieu of conducting a liquidating receivership.

4. Whether the Federal Home Loan Bank Board's application of its administrative claims procedure to the receivership of an institution that has become the subject of a purchase and assumption transaction constitutes a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution.

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## BRIEF OF MURDOCK-SC ASSOCIATES IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Murdock-SC Associates ("Murdock") respectfully submits this Brief in response to the Petition of the Federal Savings and Loan Insurance Corporation ("FSLIC") that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, dated April 3, 1987, reversing the dismissal of Murdock's suit and remanding the case for trial on the merits.

## STATEMENT OF FACTS

In April, 1984, Murdock sold an office building in Los Angeles, California to Beverly Hills Savings and Loan ("Old BHS"). As part of the purchase price, Old BHS gave Murdock an unsecured subordinated promissory

note in the sum of approximately $3,600,000, plus interest ("the Note"). E.R. 28-30.[1]

In or about April, 1985, Old BHS defaulted under the terms of the Note by, among other things, failing to meet the net worth and federal insurance reserve requirements set forth in the Note. E.R. 24.

On April 23, 1985, the Federal Home Loan Bank Board ("FHLBB") found that Old BHS was insolvent, and appointed the FSLIC as receiver for Old BHS. E.R. 63-66. On the same date, FHLBB authorized FSLIC as receiver to organize a new, federally chartered savings and loan association under the name Beverly Hills Federal Savings and Loan Association ("New BHS") to take over the assets of Old BHS. E.R. 67-69. In order to avoid the liquidation of Old BHS and the payment of insurance on its accounts, FHLBB further authorized FSLIC to enter into a "purchase and assumption" transaction, on the following terms:

> (1) FHLBB authorized FSLIC as receiver for Old BHS to enter into an Acquisition Agreement with New BHS under which New BHS would purchase substantially all the assets of Old BHS from the receiver, and would assume substantially all of the liabilities of Old BHS.
>
> (2) FHLBB further authorized FSLIC to enter into a Receiver's Agreement, pursuant to which FSLIC in its corporate capacity would purchase from FSLIC as receiver for Old BHS all of the remaining assets of Old BHS which had not been transferred to New BHS under the Acquisition Agreement.

E.R. 70-72.

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[1] "E.R." denotes the Excerpts of Record filed in the Court of Appeals.

Pursuant to FHLBB's authorization, on April 23, 1985, New BHS and FSLIC, as receiver for Old BHS, entered into an Acquisition Agreement, and FSLIC in its corporate capacity and as receiver for Old BHS, entered into a Receiver's Agreement. E.R. 73-77.

Under the terms of the Acquisition Agreement, New BHS acquired almost all of the assets of Old BHS, including the office building Murdock had sold to Old BHS. However, the liability of Old BHS on the Note remained with Old BHS. E.R. 78-91.

Under the terms of the Receiver's Agreement, FSLIC as receiver for Old BHS sold to FSLIC in its corporate capacity *all* of the remaining assets of Old BHS which had not been purchased by New BHS pursuant to the Acquisition Agreement. In addition, FSLIC in its corporate capacity assumed all of the receiver's obligations under the Acquisition Agreement, except for the liabilities of Old BHS, like the Note, owed to the management, shareholders or holders of the subordinated debt of Old BHS. E.R. 92-107.

Thus, contrary to FSLIC's assertion that certain assets were retained in the receivership estate, in order to meet the expenses of the receivership and possibly pay Old BHS' liabilities to holders of its subordinated debt,[2] the combined effect of the Acquisition Agreement and the Receiver's Agreement was to leave the receivership estate devoid of assets, and to render the Note worthless.

Instead of passively accepting a $3,600,000.00 loss, Murdock filed a Complaint in the Los Angeles County Superior Court on May 2, 1985, to foreclose a vendor's lien under California Civil Code § 3046. That statute endows a seller of real property with a vendor's lien on

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[2]Petition at 5.

the property "for so much of the price as remains unpaid and unsecured otherwise than by a personal obligation of the buyer." The Complaint named Old BHS and New BHS as defendants.

Since the lawsuit concerned real property and affected the title and the right to possession of real property, Murdock simultaneously recorded a notice of the pendency of the action with the office of the Los Angeles County Recorder, pursuant to California Code of Civil Procedure § 409(a).[3]

On or about June 13, 1985, FSLIC, as receiver for Old BHS, removed the action to federal court pursuant to 12 U.S.C. § 1730(k)(1). In addition, FSLIC and New BHS moved to dismiss Murdock's claim and to expunge the notice of lis pendens.

On December 20, 1985, the district court issued an order granting FSLIC's motion to dismiss but denying FSLIC's motion to expunge the lis pendens. *Murdock-SC Associates v. Beverly Hills Federal Savings & Loan Ass'n*, 624 F. Supp. 948 (C.D. Cal. 1985). The Ninth Circuit subsequently reversed the district court's judgment of dismissal and remanded the case for trial on the merits of Murdock's foreclosure action. *Murdock-SC Associates v.*

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[3]California Code of Civil Procedure, § 409(a), provides, in pertinent part:

> In an action concerning real property or affecting the title or the right of possession of real property, the plaintiff . . . may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action. . . . From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action as it relates to the real property and only of its pendency against parties designated by their real names.

*Beverly Hills Federal Savings & Loan Ass'n*, 815 F.2d 82 (9th Cir. 1987).

## DISCUSSION

Murdock agrees with FSLIC that review on a writ of certiorari is appropriate, under Sup. Ct. R. 17.1(a), because of a conflict between the Ninth Circuit's decisions in this case and *Morrison-Knudsen Co. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC v. Stevenson Associates*, No. 87-451 (filed September 17, 1987) and the Fifth Circuit's decisions in *North Mississippi Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), and other cases. Murdock disagrees, however, with FSLIC's contention that the only question presented by this case is whether claims against the assets of a savings and loan in receivership must be presented to FHLBB for administrative resolution in accordance with FHLBB regulations.

First, there is an issue as to whether 12 U.S.C. §§ 1464(d)(6)(C)[4] and 1729(d)[5] grant FHLBB exclu-

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[4]12 U.S.C. § 1464(d)(6)(C) provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver [appointed by the FHLBB] or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

[5]12 U.S.C. § 1729(d) provides:

> In connection with the liquidation of insured institutions, the [FSLIC] shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the

sive jurisdiction to adjudicate all claims involving the assets of an insolvent, federally insured savings and loan association. FSLIC interprets these statutes to divest both state and federal courts of jurisdiction and to grant it exclusive jurisdiction to adjudicate all disputes arising in connection with the receivership of a federally insured savings and loan association. E.R. 45-46. This interpretation is inconsistent with the clear grant to the district courts of jurisdiction over such matters contained in 12 U.S.C. § 1730(k)(1)(B),[6] and is not supported by the language of §§ 1729(d) and 1464(d)(6)(C), the legislative history of those statutes, or the regulations issued by FHLBB pursuant to those statutes.

Second, if FHLBB does have adjudicatory power, there is an issue as to whether FHLBB's assumption of exclusive jurisdiction over state law claims involving the assets of an insolvent, federally insured savings and loan associ-

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> [FHLBB], or, in cases where the [FSLIC] has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction of the matter other than said Board, subject only to the regulation of such public authority.

[6] 12 U.S.C. § 1730(k)(1)(B) provides in pertinent part:

> Notwithstanding any other provision of law . . . (B) any civil action, suit, or proceeding to which the [FSLIC] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; . . . *Provided*, That any action, suit, or proceeding to which the [FSLIC] is a party in its capacity as a conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

Since the instant litigation involves New BHS, which is not an investor, creditor or stockholder of Old BHS, the exception contained in the quoted language is not applicable here.

ation, pursuant to 12 U.S.C. §§ 1464(d)(6)(C) and 1729(d), and FHLBB's regulations,[7] violates Article III, Section 1 of the U.S. Constitution. In other words, there is a question as to whether Congress may vest in FSLIC the power to adjudicate, render final judgment and issue binding orders in connection with an action like Murdock's arising under state law, without Murdock's consent, and subject only to ordinary appellate review. Under the principles upheld by this Court in *Northern Pipeline Construction Co. v. Maritime Pipe Line Co.,* 458 U.S. 50 (1982), *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568 (1985), and *CFTC v. Schor,* 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986), Murdock cannot be compelled to submit its vendor's lien claim (arising under state law) to an administrative agency not qualifying as a tribunal under Article III of the Constitution.

Third, there is an issue as to whether FHLBB's administrative claims procedure is applicable in connection with a receivership in which FSLIC has entered into a purchase and assumption transaction in lieu of conducting a liquidating receivership.

A purchase and assumption transaction is a receivership proceeding in which the assets and liabilities of a failed association, generally not including obligations to holders of subordinated debt of the association, are fully assumed by another association promptly after the receiver's taking possession of the failed association. *See*

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[7]FSLIC incorrectly refers in its Petition to the claims procedure set forth in 12 C.F.R. Part 549, instead of the claims procedure contained in 12 C.F.R. Part 569a. 12 C.F.R. Part 549 contains the regulations that apply to FSLIC when it acts as receiver for a federally-chartered savings and loan association. The regulations that apply to FSLIC when it acts as receiver for a state-chartered association, such as Old BHS, are found in 12 C.F.R. Part 569a (1987).

*generally, FDIC v. Merchants Nat'l Bank,* 725 F.2d 634 (11th Cir.), *cert. denied,* 469 U.S. 829 (1984); *Gunter v. Hutcheson,* 674 F.2d 682 (11th Cir.), *cert. denied,* 459 U.S. 826 (1982); *Washington Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.,* 526 F. Supp. 343 (N.D. Ohio 1981). A purchase and assumption transaction is one of the alternatives made available to FSLIC to deal with the default of an insured savings and loan association. 12 U.S.C. §§ 1729(c)(1)(B)(i) (II), 1729(b)(1)(A)(iv) and 1729(a). FHLBB's regulations provide that the administrative claims procedure is *not* applicable where FSLIC is acting as receiver for an institution that has become the subject of a purchase and assumption transaction. 12 C.F.R. § 569a.13 (1987).[8]

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[8]12 C.F.R. § 569a.13 provides:

> The requirements set forth in §§ 569a.5(a), 569a.6(c)(3), 569a.8, 569a.9 and 569a.10 shall not apply to [FSLIC] as receiver for an institution that becomes the subject of a purchase and assumption transaction.

FHLBB has recently proposed new regulations concerning receiverships. 50 Fed. Reg. 48970 (1985). Under the proposed regulations, new Part 569c will provide substantive rules for the conduct of all receiverships in which FSLIC has been appointed as receiver by FHLBB, whether of state or federal associations. 50 Fed. Reg. at 78971. Proposed § 569c.15 would cover purchase and assumption transactions in lieu of existing § 569a.13, and would be applicable to the receiverships of both state and federal associations. 50 Fed. Reg. at 48982.

Although a purchase and assumption transaction is not defined by the existing regulations, proposed 12 C.F.R. § 569c.15(a) would define a purchase and assumption transaction as:

> a receivership proceeding in which the creditor liabilities of an association, not including obligations to holders of subordinated debt of the association, are fully assumed by another insured institution, a bank the deposits of which are insured by the FDIC, or the [FSLIC] in its corporate capacity and not as

**The claims procedure is superfluous in a purchase and assumption transaction because after the FSLIC conducts a purchase and assumption transaction there are no assets left in the receivership estate with which FSLIC might conceivably pay claims. Murdock is not asserting a claim against the receivership estate; it is attempting to enforce its lien against the property that FSLIC has transferred to New BHS *subject to that lien.*[9]**

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> conservator, receiver, or legal custodian, promptly following the receiver's taking possession of the association.

50 Fed. Reg. at 48996. Of course, this is a precise description of the transaction involved in the receivership of Old BHS.

Under FHLBB's proposed rules, new § 569c.15 "would continue to address and recognize the unique characteristics of receiverships followed by purchase and assumption transactions. . . ." presently recognized by § 569a.13. 50 Fed. Reg. at 48982. As FHLBB explains:

> Given the fact that a purchase and assumption transaction will provide for the assumption of creditor and depositor obligations of the association, the detailed claims procedures prescribed by the new receivership regulations are unnecessary.

50 Fed.Reg. at 48982. Therefore, under proposed § 569c.15(b), the new claims procedures which FHLBB has proposed to adopt "shall *not* apply to FSLIC as receiver for an association that becomes the subject of a purchase and assumption transaction." 50 Fed. Reg. at 48996 (emphasis added).

[9]Neither the Acquisition Agreement, nor the Receiver's Agreement, purports to transfer the assets of Old BHS free and clear of liens, and FHLBB's regulations do not provide for the avoidance of liens by FSLIC or for the transfer of property by FSLIC free and clear of liens. Indeed, under 12 C.F.R. § 569a.7(a)(2)(1987), FSLIC is required to recognize secured claims in accordance with state law. However, FHLBB has proposed to give FSLIC lien avoidance powers under § 569c.6 of the new regulations presently under consideration. 50 Fed. Reg. 48970, 48976 (1985). Aside from the initial question of whether the applicable statutes permit FHLBB to grant FSLIC authority to avoid liens, there is the more substantial issue of the *process* by which FSLIC might avoid liens. For example, under

Even if 12 U.S.C. § 1729(d) could be deemed to authorize FHLBB to adjudicate some claims, it plainly does not authorize FHLBB to adjudicate claims against an entity like New BHS, which has been created by FSLIC to assume the assets of Old BHS, and which is not in receivership. The grant of authority contained in § 1729(d) is limited to claims asserted in favor of or against institutions for which FSLIC has been appointed receiver. Consequently, under the express terms of the statute, FHLBB does not have authority to adjudicate Murdock's claim for a vendor's lien on the property of New BHS, because FSLIC has not been appointed receiver for New BHS.

Fourth, there is an issue as to whether FHLBB's application of the administrative claims procedure to the receivership of an institution that has become the subject of a purchase and assumption transaction constitutes a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution.

Under California law, a vendor's lien may only be established by a suit in equity. *Mills v. Mills,* 147

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the Bankruptcy Code, the bankruptcy trustee is granted lien avoidance powers by 11 U.S.C. § 544. In order to exercise these powers, however, the trustee is required to file an adversary proceeding against the creditor whose lien he seeks to avoid. 11 U.S.C. § 546(a); Bankruptcy Rule 7001(2). An adversary proceeding before the bankruptcy court is subject to the procedure set forth in Part VII of the Bankruptcy Rules. Bankruptcy Rule 7001. The rules contained in Part VII provide for essentially the same procedures as those governing litigation before the district court under the Federal Rules of Civil Procedure. *See* Bankruptcy Rules 7002 through 7087. By way of contrast, FHLBB's proposed rules provide for summary avoidance of lien claims by FSLIC. In other words, FHLBB is attempting to merge the traditionally separate functions of the receiver-trustee, on the one hand, and the court, on the other hand. *See Riehle v. Margolies*, 279 U.S. 545 (1929) (adjudication of claims not included in traditional powers of receiver).

Cal.App.2d 107, 118, 305 P.2d 61, 68 (1956). Consequently, neither FSLIC, as receiver, nor FHLBB, has subject matter jurisdiction to establish the existence of or to enforce Murdock's vendor's lien under California law. Moreover, neither entity has in rem jurisdiction over the property which is the subject of Murdock's lien, since the office building has been transferred by FSLIC to New BHS, an entirely separate entity, and is no longer subject to the control of FSLIC or FHLBB.

If Murdock's suit is dismissed, and its notice of lis pendens is expunged,[10] New BHS may sell the office

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[10]California Code of Civil Procedure § 409.1(b) provides in pertinent part:

> Upon recordation of a certified copy of the order expunging a notice of pendency of the action in the office of the county recorder in which the notice of the pendency of the action was recorded neither the notice of the pendency of the action nor any information derived therefrom, prior to the recording of a certified copy of the judgment or decree issued therein, shall constitute constructive or actual notice of any of the matters contained therein, or of any of the matters relating to such action, or create any duty of inquiry in any person thereafter dealing with the property described therein.

Code of Civil Procedure Section 409.8 provides in pertinent part:

> [U]pon recordation of a certified copy of an order expunging a notice of pendency of an action . . ., no person, except a person who is a nonfictitious party to the action at the time of the recording of the . . . order of expungement, who thereafter becomes, by conveyance recorded prior to the recording of a certified copy of the judgment or decree issued therein, a purchaser, transferee, mortgagee, or other encumbrancer for a valuable consideration of any interest in the real property subject to the action shall be deemed to have actual knowledge of the action or any matter claimed, alleged, or contended therein, irrespective of whether such person actually possessed actual [sic] knowledge, and irrespective of when or how such knowledge was obtained. It is the intention of the Legislature that this

building to a third party. Since a purchaser of the building in good faith and for value will take the property free of Murdock's lien,[11] the lien will be extinguished upon sale, without an adjudication on the merits of Murdock's claim, either by a court or by the receiver. Unless Murdock is permitted to pursue its suit to foreclose its lien, not only will its rights in the property be destroyed, but it will be deprived of any meaningful forum in which it could conceivably establish its rights. No possible outcome in the administrative claims procedure, even a ruling in Murdock's favor, could enable Murdock to enforce its lien against the property of New BHS, since that property is no longer subject to FSLIC's control.

Murdock's rights are abridged in the context of FSLIC's purchase and assumption transaction in a way they would not be in a straight liquidation of Old BHS, because the property upon which Murdock is asserting a lien has been transferred out of the receivership estate, without Murdock having been afforded a meaningful opportunity even to attempt to enforce its lien on the property. In a liquidation or Chapter 7 bankruptcy, at least the property would still be in the estate and Murdock would have an opportunity to argue for the existence of its lien in a forum in which the lien could conceivably be enforced.

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section shall provide for the absolute and complete free transferability of real property after the expungement or withdrawal of a notice of pendency of action.

[11]California Civil Code § 3048 provides in pertinent part that the vendor's lien established by California Civil Code § 3046 is "valid against everyone claiming under the debtor, except a purchaser or encumbrancer in good faith and for value."

## CONCLUSION

The petition for a writ for certiorari should be granted and the Court should address the issues presented in this Brief.

DATED: January 22, 1988.

Respectfully submitted,

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## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 22, 1988, I served the within Response to Petition for A Writ of Certiorari in re: "Federal Savings and Loan Insurance Corporation vs. Murdock-SC Associates" in the United States Supreme Court, October Term 1987, No. 87-452;

On the Parties in said action, by placing four copies thereof enclosed in a sealed envelope with postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 22, 1988, at Los Angeles, California

CE CE MEDINA